United Nations S/2010/166

Security Council

Distr.: General
1 April 2010

Original: English

First report of the Secretary-General pursuant to paragraph 3 of resolution 1905 (2009)

I. Introduction

1. The present report is submitted pursuant to paragraph 3 of Security Council resolution 1905 (2009), in which the Council requested me to provide written reports to the Council on a quarterly basis, with the first report no later than 1 April 2010, to include details on progress made in strengthening financial and administrative oversight of the current Development Fund for Iraq, as well as details on the legal issues and options to be considered with respect to implementing successor arrangements for the Fund and an assessment of the progress of the Government of Iraq in preparing for such arrangements.

II. Background

2. The Development Fund for Iraq established pursuant to Security Council resolution 1483 (2003) holds the proceeds of oil export sales from Iraq, as well as the transferred balances from the United Nations oil-for-food programme and transfers by Member States of funds or other financial assets or economic resources of the former Iraqi regime, its senior officials and their immediate family members, including entities owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction.

3. In 2003 the Security Council also decided that all export sales of petroleum, petroleum products and natural gas from Iraq should be made consistent with prevailing international market best practices, to be audited by independent public accountants reporting to the International Advisory and Monitoring Board in order to ensure transparency, and that all proceeds from such sales, except as provided in paragraph 4 below, should be deposited into the Development Fund for Iraq.

4. The Security Council further decided that 5 per cent of the proceeds referred to in paragraph 3 above should be deposited into the Compensation Fund established in accordance with Security Council resolution 687 (1991).

5. The International Advisory and Monitoring Board, as the audit oversight body for the Development Fund for Iraq, was established to fulfil the mandate set forth in Security Council resolution 1483 (2003). This mandate has been subsequently extended under resolutions 1546 (2004), 1637 (2005), 1723 (2006), 1790 (2007),

10-29455 (E) 050410

Please recycle

1859 (2008) and 1905 (2009). In resolution 1905 (2009), the Council also extended until 31 December 2010 the immunity of the proceeds from the sale of petroleum, petroleum products and natural gas deposited in the Fund.

6. The International Advisory and Monitoring Board has met 27 times since December 2003, including twice in 2009. All documentation, including press statements, the minutes of all Board meetings, completed audit reports and key documents related to the Board's mandate and operations continue to be available on the Board's website at www.iamb.info.

7. In 2006, the Council of Ministers of Iraq established the Committee of Financial Experts to work alongside the International Advisory and Monitoring Board and take over the tasks of the Board in monitoring the Development Fund upon the expiration of the Board's mandate. Since its inception, the Committee has been working closely with the Board and attending all of its meetings. The Committee itself meets regularly and has acquired an increasing role in the follow-up to and implementation of recommendations contained in the independent audit reports commissioned by the Board.

8. The issues covered in the present report were on the agendas of the recent meetings of the Advisory Board held in Washington, D.C., on 16 December 2009 and in Amman on 31 January 2010, and reflect recent activities with regard to both the Board and the Development Fund for Iraq.

III. Recent activities with regard to the Development Fund for Iraq and the International Advisory and Monitoring Board

9. In accordance with the terms of reference of the International Advisory and Monitoring Board, the nomination and appointment by the Government of Iraq of the external auditor for the Development Fund for Iraq is subject to approval by the Board.

10. In September 2009, the Board approved the audit appointment process and concurred with the recommendation of the Government of Iraq to appoint KPMG to conduct the 2009 audit of the Development Fund, including an interim review for the period from 1 January to 30 June 2009.

11. At the meeting held in Washington, D.C., the Advisory Board reviewed draft interim statements of cash receipts and payments for the Development Fund and the oil proceeds receipts account. The Board was also briefed by KPMG on the results of its interim work. The interim report reiterated earlier findings about the reporting of revenues in the Fund's statement of cash receipts and payments. A summary of the results of the KPMG interim report is available on the websites of both the Advisory Board (www.iamb.info) and the Committee of Financial Experts (www.cofe-iq.net).

12. At the meeting held in Amman, the Advisory Board was informed that the audit was well under way and that the external auditor, KPMG, expected to issue a comprehensive summary and brief the Board when it met in late April 2010.

13. With regard to the 2010 audit, at the same meeting in Amman the Committee of Financial Experts briefed the Advisory Board on the proposed evaluation process

to select an external audit firm to conduct the 2010 audit of the resources and disbursements of the Development Fund.

14. The representative of the Government of Iraq to the International Advisory and Monitoring Board, the President of the Board of Supreme Audit and the representative of the Committee of Financial Experts provided regular briefings to the Advisory Board on progress in implementing its earlier recommendations, as well as on progress in implementing recommendations contained in the audit reports commissioned by the Advisory Board.

15. In order to enhance the transparency and accountability of the Development Fund for Iraq, the Committee of Financial Experts has published monthly summaries of the Fund's cash inflows and outflows on its website.

16. In addition, the Committee has finalized a time-bound action plan to implement a comprehensive oil-metering system, which is scheduled to become fully operational by the end of 2011, except at one company for which it will be completed by 2012. The action plan to implement the comprehensive oil-metering system, as well as its implementation status, is available on the websites of both the Advisory Board and the Committee.

17. In this respect, I welcome the detailed update from the Committee and strongly urge the full implementation of the action plan as envisaged by the Government of Iraq.

18. In January 2010, the Controller of the United Nations, Jun Yamazaki, my designated representative on the Advisory Board, briefed the Council on the activities of the Development Fund and the Board.

19. The next meeting of the Advisory Board, with the participation of the Committee of Financial Experts, is tentatively scheduled for late April 2010.

IV. Legal issues and options relating to the successor arrangements for the Development Fund for Iraq

A. Iraq escrow account and other transfers to the Development Fund for Iraq

20. Further to my report pursuant to paragraph 5 of Security Council resolution 1859 (2008) (S/2009/185), once all outstanding activities under the oil-for-food programme are concluded, and taking into account (a) any necessary residual activities, (b) any indemnities that may be provided by the Government of Iraq and (c) the need to ensure the availability of sufficient funds for the Organization to meet the costs and expenses that (i) have been incurred, (ii) are associated with the winding down of the oil-for-food programme and/or (iii) arise from the cooperation of the United Nations with Member States in respect of investigations and proceedings related to the programme, all other remaining funds should be transferred from the Iraq escrow account to the Development Fund for Iraq.

21. In the light of the need to make the above-mentioned transfers, it would be preferable if all outstanding activities under the oil-for-food programme were terminated prior to the transition to the mechanism that is to succeed the Development Fund, with a view to ensuring the transparency and efficiency of that

transition. If that is not feasible, the remaining unencumbered funds in the Iraq escrow account shall be transferred directly to the successor arrangements.

22. In the light of the continuing obligations of Member States under paragraph 29 of Security Council resolution 1546 (2004), the Council may also wish to take into account the possibility that additional funds, other financial assets or economic resources may be identified or discovered as belonging to the former Iraqi regime, its senior officials or their immediate family members, including entities owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction. In the event that such funds, other financial assets or economic resources are found and frozen in accordance with paragraph 23 of Security Council resolution 1483 (2003), it will be necessary to establish a mechanism for the transfer of such funds to the successor arrangements for the Development Fund.

B. Obligatory payments to the United Nations Compensation Fund

23. The issue of arrangements for ensuring payments to the United Nations Compensation Fund following the transfer of the oversight function from the International Advisory and Monitoring Board to the Committee of Financial Experts has been highlighted in two of my previous reports, the report pursuant to paragraph 5 of Security Council resolution 1859 (2008) (S/2009/385) and the report pursuant to paragraph 3 of that same resolution (S/2009/430).

24. In paragraph 21 of Security Council resolution 1483 (2003), the Council decided not only that 5 per cent of the proceeds of all export sales of petroleum, petroleum products and natural gas from Iraq should be deposited into the Compensation Fund established in accordance with resolution 687 (1991) but also that "unless an internationally recognized, representative Government of Iraq and the Governing Council of the United Nations Compensation Commission ... decide otherwise, this requirement shall be binding on a properly constituted, internationally recognized representative Government of Iraq and any successor thereto".

25. Thus, unless the Government of Iraq and the Governing Council of the United Nations Compensation Commission mutually agree to change the percentage or terminate such payments (or all outstanding United Nations Compensation Commission awards have been paid off), it is imperative that the Government of Iraq continue to be obliged to deposit 5 per cent of the proceeds of all export sales of petroleum, petroleum products and natural gas into the Compensation Fund. It is also necessary to ensure that the present mechanism is maintained or that an alternative, equally effective mechanism is established to ensure the payment into the Compensation Fund.

26. On a practical level, as an alternative mechanism to ensure such payment, the banking services agreement to be established by the Government of Iraq for any accounts that would be used to hold the proceeds of export sales of petroleum, petroleum products and natural gas from Iraq could include an article specifying the percentage that would be taken from the total and deposited into the Compensation Fund. I recognize the difficulty in ensuring that all proceeds from the export sales of petroleum, petroleum products and natural gas are recorded; however, a mechanism that would trigger a possible audit of the Fund could be established. Alternatively, the Security Council may request that a fixed yearly amount be paid by the

Government of Iraq into the Compensation Fund, irrespective of the amount of oil proceeds.

C. Privileges and immunities of the Development Fund for Iraq

27. In accordance with paragraph 22 of its resolution 1483 (2003), the Security Council accorded the Development Fund for Iraq privileges and immunities equivalent to those enjoyed by the United Nations, subject to certain exceptions. From the inception of the Fund, it was clearly understood that the Fund would enjoy such privileges and immunities for a limited and specified period of time. While the original expiration date of 31 December 2007 has been extended several times, including most recently in paragraph 1 of Security Council resolution 1905 (2009), there is no legal basis on which to perpetuate the protected status of the Fund once it becomes a fully nationally owned and controlled fund. Unless otherwise decided by the Council, the Fund should thus cease to enjoy such privileges and immunities on 31 December 2010.

28. In addition to the environmental and contractual claims to which the Development Fund is currently exposed under the exceptions to the privileges and immunities specified in paragraph 22 of Security Council resolution 1483 (2003) and paragraph 27 of Security Council resolution 1546 (2004), the Government of Iraq should be prepared to assume responsibility for any claims and liabilities to which the successor arrangements may be exposed.

D. Dissolution of the International Advisory and Monitoring Board

29. Following the adoption of Security Council resolutions 1483 (2003) and 1511 (2003), and having approved the terms of reference of the International Advisory and Monitoring Board, the Secretary-General of the United Nations, the Managing Director of the International Monetary Fund (IMF), the Director General of the Arab Fund for Economic and Social Development and the President of the International Bank for Reconstruction and Development jointly signed an instrument on 21 October 2003 establishing the Advisory Board.

30. Further to the extension of its mandate through 31 December 2010 in resolution 1905 (2009), and in accordance with section 9 B of the revised terms of reference of the Advisory Board, "arrangements will be made for the prompt dissolution of the International Advisory and Monitoring Board no later than 31 December 2010". Thus, to the extent that the executive heads of the four organizations concerned established the Advisory Board, it would be for them to make the necessary arrangements to dissolve it once the Security Council has terminated the Board's mandate.

31. Given that among the purposes of the International Advisory and Monitoring Board is the promotion of the objectives of Security Council resolution 1483 (2003) and subsequent resolutions, in particular that the proceeds from the export sales of petroleum, petroleum products and natural gas need to be used for the benefit of the Iraqi people, the Government of Iraq may wish to consider reaffirming its continued adherence to this principle as the successor arrangements to the Development Fund for Iraq are being developed.

V. Assessment of the progress of the Government of Iraq in preparing for the successor arrangements for the Development Fund for Iraq

32. In paragraph 4 of Security Council resolution 1905 (2009), the Council called upon the Government of Iraq to put in place the necessary action plan and timeline by 1 April 2010 and to ensure the timely and effective transition to a mechanism that is to succeed the Development Fund by 31 December 2010 that takes into account IMF stand-by arrangement requirements, includes external auditing arrangements and enables Iraq to meet its obligations as established in the provisions of paragraph 21 of Security Council resolution 1483 (2003).

33. I recognize the view of the International Advisory and Monitoring Board that the Committee of Financial Experts is ready to assume the oversight responsibilities and to conduct competent and independent oversight of the Development Fund for Iraq.

34. I welcome the first quarterly report of the Government of Iraq to the Security Council. The report provides an action plan and timeline for the transition from the Development Fund for Iraq, and I commend the Government of Iraq for acknowledging its obligations pursuant to paragraph 21 of Security Council resolution 1483 (2003).

35. I recognize that the action plan and timeline as presented by the Government of Iraq is realistic, and I am pleased that the Government of Iraq plans to select an independent international auditor to confirm that all proceeds of export sales of petroleum, petroleum products and natural gas from Iraq are accounted for.

36. The Committee of Financial Experts has finalized a time-bound action plan to implement a comprehensive oil-metering system, and I encourage the Government of Iraq to provide an update on this matter in its next quarterly report to the Security Council.

37. Work remains to be done to fully implement the action plan as presented by the Government of Iraq for the transition to successor arrangements for the Development Fund for Iraq, and I look forward to keeping the Security Council informed of the progress of the Government of Iraq in preparing for such arrangements.